

CRIMINAL DISENFRANCHISEMENT OF PRISONERS: A COMPARATIVE AND CONSTITUTIONAL STUDY

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Abstract:

The Revolutions in the 18th and 19th century shaped the world as we know today. One among the major political causes that stirred mutiny was suffrage. Whilst the world saw the manifestation of this struggle into ‘Universal Adult Suffrage’, the recent decades have seen a sharp curve derecognizing the status of voters and among them the worst affected are prisoners. Many countries around the world, including the US, UK and India, through legislation have placed restriction on prisoners, sometimes even ex-felons, from casting their votes at various levels. Many of these countries represent the biggest democracies in the world, whilst a significant part of their population is debarred from exercising their ‘Right to Vote’, which has been recognised as one among the fundamental covenants of democracy. Voting rights are an especially powerful symbol of inclusion in the society and their denial is often criticized, as prisoners and ex-convicts must continue to pay taxes, abide by laws they cannot contribute to making, and uphold other responsibilities as citizens. According to political thinkers¹, the importance of suffrage is that it stands as a ‘certificate of social standing’ and as the basis for dignity. A general trend of calling this a ‘retributive’ mechanism has failed to prove its significance and there is a dire need to study and understand disenfranchisement in relation to rehabilitative mechanisms of punishment, that is gaining momentum around the world. There exists a general absence of any uniform principle governing limitations of universal suffrage due to felony charges, and any attempt of analyzing this would require an in-depth study of the philosophy of disenfranchisement. The authors aim to study the changing dynamics of disenfranchisement in the light of human rights jurisprudence around the globe.

Keywords: Disenfranchisement, Prisoners, Right to Vote, Democracy.

INTRODUCTION

Disenfranchisement refers to taking away power or opportunities, especially the right to vote, from a person or group of persons². The ability to participate in elections, in particular the power to cast votes, is the cornerstone of any democratic nation. Disenfranchisement is based primarily on the John Locke’s concept that those who

¹ Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States, Perspectives on Politics*, 2(3), 491-505 (2004).

² Disenfranchisement, Cambridge Advanced Learner’s Dictionary (4th ed. 2013).

break the social contract must be barred from participating in the process of making society's rules.³ Theoretically, this practice embodies a tension between the idea of universal democratic participation and the exclusion experienced by those who break the most serious rules prescribed by a community.⁴

The practice of disenfranchisement originated as a means to ostracize and create barriers for participation in civil society. The history of disenfranchisement can be traced to the medieval era, with origins in ancient Greece.⁵ The British barred voting for outlawry⁶ and criminals were punished with "civil death", the total loss of citizenship rights⁷. Disenfranchisement laws in America appeared in the 1600s as punishment for morality crimes.⁸ The power of the states to establish voter qualifications is imbibed in Article I Section II of the Constitution of the United States of America, which states that "the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature".⁹ At its beginning, the American franchise was limited to white male property owners. The first instances of felony disenfranchisement appeared during the Reconstruction period after the passage of the 15th amendment to the U.S. Constitution, which granted African American Men the right to vote.¹⁰ Unable to explicitly ban black voters without violating federal law, the resulting state constitution in the United States barred persons convicted of a felony from exercising their voting rights, the law which exists to date.

In India, Section 62(5) of the Representative of People's Act, 1951 has barred one from exercising his right to cast vote if "he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police".¹¹ This however, do not extend to prisoners who have served her sentence. However, this blanket ban on prisoners' right to vote is not only a violation of the spirit and soul of the Constitution, but also of the basic principle of equality enshrined under Article 14 of the Constitution of India.

³ Bernard Schwartz, *The Amendment in Operation: A Historical Overview*, in *The Fourteenth Amendment Centennial* 29 (Bernard Schwartz ed., 1970).

⁴ Pablo Marshall, *Voting from Prison: Against The Democratic Case For Disenfranchisement*, *Ethics & Global Politics*, 11, 1–16 (2018).

⁵ Nathan P. Litwin, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 *CONN. PUB. INT. L.J.* 236 (2003).

⁶ Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 *U. MIAMI L. REV.* 1317, 1318-19 (2003)

⁷ Katherine Iren Pettus, *Felony Disenfranchisement in America: Historical Origins, Institutional Racism, And Modern Consequences*, 30 (Marilyn McShane & Frank P. Williams III eds., 2005).

⁸ Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 *MINN. L. REV.* 231, 236 (2004).

⁹ U.S. CONST. art. I, § 2.

¹⁰ George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 *Fordham Urb. L.J.* 851 (2005).

¹¹ Representation of People's Act, 1951; § 62(5).

The number of persons disenfranchised due to a felony conviction has increased drastically in recent decades¹². Governmental agencies have attempted to attribute this statistic to the rise of crime rates, but in fact, recent studies have shown changes in law and policy have led to this mass incarceration.¹³

PHILOSOPHY OF DISENFRANCHISEMENT

By virtue of having broken the law of the land, prisoners lose their right to vote and are muted from voicing their opinion of the policies and laws to which they will be subjected. Philosophers have long debated the merits of restricting the franchise to prisoners due to their conviction.¹⁴ Voting rights empowers citizens with an important means to affirm and communicate their sense of civic duty and proud membership in this country.¹⁵ Voting can be an important medium to create feelings of dignity and equality. Initially discussed in early Platonic scriptures¹⁶, the social contract theory is given its first definition by Thomas Hobbes.¹⁷ The theory was further examined by John Locke and Jean Jacques Rousseau.

The Social Contract Theory has long been used to justify prisoner's disenfranchisement, holding that by the virtue of a prisoner's inability to respect the laws of society, one has forgone his right to exercise his civil rights among others. This is based on the ideology that states have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of a representative democracy.¹⁸ There is a fine argument for punishing prisoners who through committing an offence or crime and could not live up to his end of the bargain by obeying the law. However, upon careful examination of the social contract, it is quite evident that disenfranchisement is an inappropriate and obsolete punishment that does more harm than good.¹⁹

In order to evaluate disenfranchisement in the light of the Social Contract Theory, one must dwell into the relationship between the citizen and the state and the importance of 'right to vote' in democracies. The classical argument rests on the reasoning "that criminals violate the social contract and thereby forfeit the political rights to which the contract entitles them".²⁰ According to the Social Contract theory, disenfranchisement "is a voluntary surrender presumed implicit in the crime itself, not a response by others to the crime".²¹ Due to the voluntary nature of this forfeiture, there is a need to distinguish it from 'punishment'. This line of argument is based on the assumption that by violating a law, "the criminal seems to be taking back his agreement to the

¹² Dorothy Roberts, The Social and Moral Cost of Mass Incarceration in African American Communities. *Stanford Law Review*, 56 (5), 1271-1305 (2004). [://www.jstor.org/stable/40040178](http://www.jstor.org/stable/40040178)

¹³ Derek A. Kreager and Candace Kruttschnitt, *Inmate Society In The Era Of Mass Incarceration*, *Annu Rev Criminal*, 261–283, (2018).

¹⁴ Michael Lessnoff, *Social Contract Theory*, 5 New York Univ. Press (1990).

¹⁵ Eli L. Levine, Does the Social Contract Justify Felony Disenfranchisement? 1 *Wash. U. Jur. Rev.* 193 (2009).

¹⁶ David G. Ritchie, Contributions to the History of the Social Contract Theory, 6 *Political Sci. Q.* (1891).

¹⁷ Jonathan Wolff, Hobbes and the Motivations of Social Contract Theory, *Int. J. Philos. Stud.*, 271-286 (1994).

¹⁸ Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, Oxford University Press (2006).

¹⁹ Eli L. Levine, Does the Social Contract Justify Felony Disenfranchisement? 1 *Wash. U. Jur. Rev.* 193 (2009).

²⁰ Jeffery Reimen, Liberal and Republican Arguments Against the Disenfranchisement of Felons, 1 *CrI Just Ethics* (2005).

²¹ *Id* at 4.

contract and thus forfeiting the role that the contract had given him in determining the law”.²² Therefore due to the voluntary nature of one’s act and his explicit knowledge of the same, disenfranchisement lacks the nature of crime in itself.

INTERNATIONAL POSITION

Prisoner disenfranchisement indeed is a global phenomenon. Nevertheless, different countries have different criteria and conditions for the implementation of the same. A general idea with regard to the current trend in relation to disenfranchisement of prisoner can be traced by have an analysis of the following countries, i.e., United States of America and the United Kingdom.

United States of America

Prisoner Disenfranchisement in the United States of America started as an aftermath of the ratification of the Fifteenth Amendment to the Constitution of United States of America. The amendment prohibited denying the right to vote on account of race.²³ Criminal disenfranchisement became the most subtle method of excluding African- Americans from the franchise. Whilst voting restrictions were already in place, even before the Fifth Amendment, between 1890 and 1910, many Southern states tailored their disenfranchisement laws to increase the effect of these laws on the blacks. While the black community comprises approximately 12% of the population²⁴, they amount to around 36% of the population that has lost the voting rights due to felony conviction.²⁵

In the absence of any national standard for voting rights for criminal offenders, there is wide variation in state laws regarding voting rights for offenders and ex-offenders.²⁶ Another factor that sets apart disenfranchisement laws in the United States from that of other countries is the fact that some states in the United States disenfranchise even non-incarcerated prisoners, i.e., even the ones who have completed their prison sentence.²⁷ The constitutionality of Prisoners Disenfranchisement was upheld by the Supreme Court in the case of *Richardson v. Ramirez*²⁸ where the court held that disenfranchisement laws do not violate the Fourteenth

²² Id at 10.

²³ Andrew L. Shapiro, Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy, *The Yale L. J.* 537-566 (1993).

²⁴ U.S. Census Bureau, *The Black Population: 2000* (Aug. 2001). <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

²⁵ Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws* 1 (1998).

²⁶ JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY*, (Oxford University Press, 2006).

²⁷ *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and The Purity of the Ballot Box*, Harv. L. Rev. , 1300-1317 (1989).

²⁸ *Richardson v. Ramirez*, 418 U.S. 24 (1974)

Amendment to the United States Constitution. But in 1985, in *Hunter v. Underwood*, the Court held that an Alabama law disenfranchising certain criminal offenders violated the Fourteenth Amendment's Equal Protection Clause because, "the law had a disproportionate impact on blacks and was adopted with racially discriminatory intention".²⁹ There shall be a slow, yet significant change in disenfranchisement laws in the United States. A shift in states laws has been increasingly associated due to the changing human rights jurisprudence around the globe.³⁰

United Kingdom

The United Kingdom practice criminal disenfranchisement in a more limited way than the United States of America, barring only certain offenders from voting, and only while they are incarcerated.³¹ However, the decision of the European Court on Human Rights in *Hirst v. United Kingdom*³² has drastically altered UK's stance on Prisoner Disenfranchisement. As per the disenfranchisement laws in the United Kingdom, prisoner undergoing sentence is legally incapable of casting vote exercising their right at any parliamentary or local government election.³³ The case held that disenfranchisement laws as in violation of Article 3 of the First Protocol to the European Convention on Human Rights³⁴ to which England is a signatory and therefore violates 'right to free elections'.³⁵ The court described disenfranchisement a "blunt instrument which affected a significant category of people in a discriminatory way".³⁶

INDIAN POSITION

Democracy is one among the basic pillars of the Indian Constitution.³⁷ Democracy can only be sustained through the process of fair and free elections.³⁸ Many constitutional thinkers have emphasized on the importance of the 'right to vote' in a democracy.³⁹ Article 326 of the Constitution of India states that, "elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage".⁴⁰ Nevertheless the explanation to the section allows the legislature to place conditions for disqualification for the same. These

²⁹ *Hunter v. Underwood*, 471 U.S.

³⁰ Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13:1 Temp Political & Civ Rts L Rev 71 (2003).

³¹ Manza and Uggan, *supra* at 26.

³² *Hirst v United Kingdom (No 2)* (2005) ECHR 681.

³³ Representations of Peoples Act, 1983, § 3(1).

³⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 25 August 2019]

³⁵ Kavita Singh, *Civil Death of Prisoner: Disenfranchising the Prisoner in Reality Causes His Civil Death*, NUJS L. Rev. 239 (2008).

³⁶ *Hirst v Attorney-General*: (2001) QBD 17.

³⁷ *Keshavananadha Bharti v. State of Kerala*, AIR 1976 SC; *N. P. Ponnuswamy v. Returning Officer, Namakkal. Constituency*, (1952) S.C.R. 218.

³⁸ 3 N. Prakash And M.Yashasvi, *Disenfranchisement of Prisoners*, 22 Cochin University Law Review (1998).

³⁹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 941 (2006).

⁴⁰ INDIA CONST. art. 326.

conditions are reflected and enforced through Section 62(5) of the Representation of People's Act, 1951. The section states that "No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police."⁴¹ The provision has gathered immense criticism as Section 62 does not create any classification among prisoners on the basis of varying degree of punishment except with regard to preventive detention.⁴²

The constitutional validity of S.62 of the Representation of Peoples Act, 1951 was challenged in the case of *Anukul Chandra Pradhan v. Union of India*.⁴³ The contention before the Hon'ble Court was that the provision of disenfranchisement under Section 62 of the Representation of Peoples Act, 1951 is in violation of the Article 14 of the Constitution. It was further contended that there is violation also of Article 21 of the Constitution of India as preventing one from exercising his democratic right to vote, denies dignity of life.⁴⁴ The irony in the section is reflected by the virtue of the fact that restriction placed under the section applies to a person in lawful custody of the police which would include a person detained during investigation before a charge sheet has been filed against him. On the other hand, a person convicted and sentenced to imprisonment but released on bail is permitted to vote.⁴⁵ The rationale behind the same is that "a person who is in prison for his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression."⁴⁶ Similarly, in the case of *Sunil Batra vs. Delhi Administration*, the restriction imposed on a prisoner under Sec. 30 (2) of the Prisons Act, 1894 was held not to be unreasonable as the restriction is imposed keeping in view the safety and security of the prisoners and the prison, and the same could not be treated as being violative of Article 19 (1) (d) of the Constitution.⁴⁷

CONSTITUTIONALITY VALIDITY OF DISENFRANCHISEMENT IN LIGHT OF HUMAN RIGHTS JURISPRUDENCE

Article 25 of the International Covenant on Civil and Political Rights states that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (6) To vote and to be elected at genuine periodic elections which shall be by universal

⁴¹ Representation of Peoples Act, 1951 §62(5).

⁴² N. Prakah and M. Yashasvi, *supra* at 38.

⁴³ *Anukul Chandra Pradhan v. Union of India*, AIR 1997 SC 2814.

⁴⁴ P. CHANDRASEKHAR RAO, *THE INDIAN CONSTITUTION AND INTERNATIONAL LAW* 139 (1993).

⁴⁵ *Anukul Chandra Pradhan*, AIR 1997 SC 2814.

⁴⁶ *A. K. Gopalan vs State of Madras*, AIR 1950 SC 88.

⁴⁷ *Sunil Batra vs. Delhi Administration* AIR 1980 SC 1597.

and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
 (c) To have access, on general terms of equality, to public service in his country.”⁴⁸

Developing this jurisprudence further, the UN Office of the High Commissioner for Human Rights have stated that any restrictions on the right to vote must necessarily be restrictions that are “necessary in a democratic society for a public goal.”⁴⁹

India has accessed articles of the ICCPR through interpretation of the fundamental rights under Part III of the Constitution of India and through various case laws. Though International treaties do not become automatically of domestic laws⁵⁰, Articles 51 (c) of the Constitution of India stipulates under the Directive Principles of State Policy, that “The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with another.”⁵¹ India’s commitment towards human rights can be easily traced from actions as early as the 1940s and through both in the U.N. Charter and in India's own Constitution.⁵²

The reflection of the provisions of the ICCPR is evident through Part III of the Constitution of India, which postulates ‘Fundamental Rights.’ Article 14 of the Constitution is harbinger in protect ‘equality before law’ and ‘equal protection of law’. Under Article 14 of the constitution, equal treatment of the unequal is as bad as unequal treatment of equals.⁵³ Section 62(5) of the Representation of People Act, unfortunately, do not provide for any ‘reasonable classification’ among persons confined in prison. More over even undertrials in lawful police and judicial custody are barred from exercising their ‘right to vote’. By creating this blanket provision, the Legislature has failed to recognize the distinction between undertrials and persons convicted of a crime.⁵⁴ The International Covenant on Civil and Political Rights, 1966 also provides for, the accused to be segregated from convicted persons and be subjected to separate treatment.⁵⁵ Another criticism against criminal disenfranchisement is there is no reasonable differentia between the convicts themselves. There is no separation on the basis of gravity of the offence committed by the convicted person.⁵⁶ Even though the act has not expressly made any classification, the effect of S. 62(5) of the Representation of Peoples Act, 1951 entails a classification between those who can afford bail and those who cannot.⁵⁷ “What must be looked into is the effect and not the object of the law”⁵⁸ and through the implementation of Section 62(5) creates unequals equally.

⁴⁸ International Covenant on Civil and Political Rights art. 25, Dec 19 ,1966.

⁴⁹ UN Office of the High Commissioner for Human Rights, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies 48 (2002).

⁵⁰ State of Madras v G.G. Menon, AIR 1954 SC 517 ; People's Union for Civil Liberties v Union of India (1997) 3 SCC 433.

⁵¹ IND. CONST art 51 (c).

⁵² Prakash Shah, *International Human Rights: A Perspective in India*, 21 Fordham Int. Law J 24-44, 33 (1997).

⁵³ All India Sainik Schools Employees' Assn. v. Sainik Schools Society, 1989 Supp (1) SCC 205.

⁵⁴ Hussainara Khatoon(I) to (VI) v. Home Secy., Bihar, (1980) 1 SCC 115.

⁵⁵ International Covenant on Civil and Political Rights art. 10, cl. 2(a), Dec 19 ,1966.

⁵⁶ Barry Mitchell, *Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling*, Mod. L. Rev., 3, 393-412 (2001).

⁵⁷ N. Prakash And M. Yashasvi, *supra* note 39 at 335.

⁵⁸ R.C. Cooper v. Union of India, AIR 1970 SC 1318.

Criminal disenfranchisement is also violative of Article 21 of the Constitution as it violates one's dignity.⁵⁹ Apart from being far from fully reintegrated into their communities, disenfranchised persons are denied both the opportunity to influence policies in their communities and the dignity of political voice.⁶⁰ Most prisoners are required to wait to exercise their 'Right to Vote' again and this waiting period is clearly not proportional to the crime.⁶¹ There exists no just reason to require a felon to wait this extended amount of time and this is beneath the dignity of man.⁶²

Therefore, it is quite evident that criminal disenfranchisement is in violation of fundamental rights enshrined in Part III of the Constitution i.e., Article 14 and Article 21.

CONCLUSION

The 'Right to Vote' is not a settled matter in modern democracies⁶³ and disenfranchisement of prisoners is a threat to democracy, that ought to be challenged.⁶⁴ Supporters of criminal disenfranchisement argue that such laws may deter crime,⁶⁵ though there is no substantial evidence to show that it actually accomplishes the goal of deterrence. In fact, recent studies suggest that "there exists a negative correlation between voting and subsequent criminal activity among those with and without prior criminal history."⁶⁶ The status of disenfranchisement has become outlier and this is further affirmed by the growing reluctance of other nations to accept felony disenfranchisement.⁶⁷ Disenfranchisement of prisoners cannot be justified in the modern society that aims to adhere to International Human Rights.⁶⁸ If the aim of penology is to rehabilitate criminals, then criminal disenfranchisement is inconsistent with this aim.⁶⁹

⁵⁹ Jonathan Purtle, *Felon Disenfranchisement in the United States: A Health Equity Perspective*, Am J Public Health 632–637, (2013).

⁶⁰ Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 Mich. J. Race & L. 383 (2017).

⁶¹ Amy Health, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote*, American University Journal of Gender, Social Policy & the Law 2, 328-357, 354 (2017).

⁶² *Id* at 355.

⁶³ 1 Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?* 5 Anal. Soc. Issues Public Policy, 235 - 247 (2005).

⁶⁴ *Id* at 245.

⁶⁵ Behrens, *supra* note 8 at 236.

⁶⁶ Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 217 (2011).

⁶⁷ American Civil Liberties Union, *Democracy Imprisoned: A Review of The Prevalence And Impact Of Felony Disenfranchisement Laws In The United States*, OHCHR, Sept. 2013,

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15128_E.pdf

⁶⁸ Michael Plaxton and Heather Lardy, *Prisoner Disenfranchisement: Four Judicial Approaches*, 28 Berkeley J. Int'l Law. 101 (2010).

⁶⁹ N. Prakash And M.Yashasvi, *supra* note 39 at 339.

The right to vote is fundamental to a democratic system of government, but sadly, the present definition fails to be inclusive of a significant portion of the society i.e., criminals.⁷⁰ The case of criminal disenfranchisement is a powerful reminder that even the most basic elements of democratic governance, such as a universal adult franchise, can still be threatened even in a democratic state.⁷¹ Nevertheless, bestowing the 'Right to Vote' might constitute an adequate response to tackling serious issues such as prison reforms and may even perhaps be the starting point of a constructive solution to a more inclusive society.⁷² These arguments against criminal disenfranchisement, should at least be strong enough to generate a reconsideration of what exists today as one among the greatest threat to democracy.



⁷⁰ Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727 (1998).

⁷¹ 3 Jeff Manza and Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 Am. Political Sci. Rev. 491-505, 502 (2004).

⁷² Marshall, *supra* note 8 at 14.